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No. 89-2004 (2)

In The

Supreme Court of the United States

October Term, 1989

THOMAS F. KRANTZ,

Petitioner,

-v-

STATE OF MONTANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Montana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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August 1990

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QUESTIONS PRESENTED

1. Whether the issue presented by petitioner is prematurely placed before this Court and unripe for adjudication.

2. Whether the Sixth Amendment or the Fourteenth Amendment to the United States Constitution prohibits the application of Montana's weapon enhancement statute as a sentencing factor being considered by the trial court at the time of sentencing.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statute listed below is in addition to those listed by the petitioner. (Petition at 2-3.)

Mont. Code Ann. § 45-5-401 (1987):

> **Robbery.** (1) A person commits the offense of robbery if in the course of committing a theft he:
>
> (a) inflicts bodily injury upon another;
>
> (b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or
>
> (c) commits or threatens immediately to commit any felony other than theft.
>
> (2) A person convicted of the offense of robbery shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000, except as provided in 46-18-222.
>
> (3) "In the course of committing a theft" as used in this section includes acts which occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

STATEMENT OF THE CASE

The respondent, State of Montana, agrees with the petitioner's statement of the case with the exception of two critical points. The petitioner was not charged with use of a weapon during the commission of his felonies because no Montana or federal statute requires such a charge. While no mention of use of a weapon was made

in the information, the record shows that the State alleged the use of a weapon in its affidavit and motion for leave to file the information. (Petition [Pet.] App. A at 2a, 15a.) The record also indicates that the prosecution repeatedly elicited testimony that petitioner and his accomplice used a handgun during the robberies. (Pet. App. A at 16a.) The Montana Supreme Court found specifically that the petitioner had "actual notice that use of a weapon would be considered during sentencing." (Pet. App. A at 16a.) The Montana Supreme Court found that failure to specifically place an allegation of weapon usage in the information was harmless error. (Pet. App. A at 16a.)

Contrary to petitioner's statement, the Montana Supreme Court did not hold that the weapon enhancement statute at issue "bore a close resemblance to statutes defining crimes." (Pet. at 6.) The Montana Supreme Court did recognize that the weapon enhancement statute contained elements "similar to those found in substantive criminal statutes" but the weapon enhancement statute also required elements "not necessary to establish guilt of the underlying crime." (Pet. App. A at 12a, 13a.)

SUMMARY OF THE ARGUMENT

This Court should deny the petition for writ of certiorari because the issue presented, the constitutionality of Montana's weapon enhancement statute as applied to petitioner, is not ripe for review. However, should this Court determine the issue is ripe, the instant case is factually distinguishable from *Specht v. Patterson* and

Mullaney v. Wilbur, and is controlled by *McMillan v. Pennsylvania*, and more importantly by *Walton v. Arizona*, a very recent case decided by this Court and not available to petitioner when he asked this Court for certiorari. The Montana Supreme Court's decision in *State v. Krantz*, therefore, does not conflict with any decision by this Court, and the petition should be denied.

ARGUMENT

I. THE ISSUE PRESENTED BY THIS CASE, THE CONSTITUTIONALITY OF MONTANA'S WEAPON ENHANCEMENT STATUTE, IS NOT RIPE FOR REVIEW BY THIS COURT.

While the Montana Supreme Court determined that petitioner had standing to challenge the constitutionality of Mont. Code Ann. § 46-18-221, the weapon enhancement statute, the Court determined petitioner's standing by looking at the two sentencing issues before the Court on appeal: his use of a weapon in the commission of the underlying felonies and the designation of petitioner as a dangerous offender. *State v. Krantz*, 47 St. Rptr. 454, 457, 788 P.2d 298, 301 (1990). His designation as a dangerous offender has not been placed before this Court for review, and petitioner is asking only that Mont. Code Ann. § 46-18-221 be invalidated. The Montana Supreme Court's decision, however, is unclear as to whether the finding of standing was made because of his designation as a dangerous offender for parole purposes or the application of the weapon enhancement statute. An issue that was not addressed, however, by the Montana Supreme Court was the issue of ripeness.

Generally, courts refuse to rule on a constitutional issue in advance of the necessity of deciding it, nor will courts accept constitutional issues for adjudication when the controversy is premature or unripe. This Court has declared that it will not assume in advance that a state will so construe its laws to bring them in conflict with the Federal Constitution. *Oil Chemical and Atomic Workers International Union v. Missouri*, 316 U.S. 363 (1960).

Petitioner is asking this Court to grant certiorari because of a "potential" for erosion of Sixth Amendment standards (Pet. at 16), or a hypothetical violation of due process (Pet. at 13, 19), even though the application of the weapon enhancement statute to petitioner did not increase the sentence beyond the statutory maximum for the two counts of robbery for which he was found guilty.

Petitioner was sentenced to 30 years, concurrent, on each conviction with an additional 10-year sentence to be served consecutively because of the use of a weapon during the commission of the felonies. (Pet. App. A at 24a, 25a.) The maximum sentence for each count of robbery under Mont. Code Ann. § 45-5-401 is 40 years. Petitioner was subject to a sentence of 80 years for the felonies with an additional 10 for the use of a weapon, or 90 years. However, petitioner was sentenced to a total of 40 years. (Pet. App. C at 24a, 25a.)

A brief review of petitioner's argument is needed to apply the ripeness argument. An important case and one relied on by the Montana Supreme Court dealt with a sentencing scheme which did not increase the maximum sentence possible for the underlying crime, notwithstanding the mandatory nature of the statute. *McMillan v.*

Pennsylvania, 477 U.S. 79 (1986). This Court found such a statutory scheme constitutional, as discussed *infra*. Petitioner now seeks to distinguish Montana's sentence enhancement statute on the basis that, unlike the Pennsylvania statute, the Montana statute enables the maximum sentence for the underlying offense to be increased. Therefore, the rule of law enunciated in *McMillan*, *supra*, and followed by the Montana Supreme Court does not apply.

Petitioner claims in his petition that the statute allows a sentencing court, after consideration and application of the weapon enhancement statute, to sentence a defendant beyond the maximum term of incarceration for the underlying offense. (Pet. at 19.) This argument, while philosophically interesting, is simply not preserved by the facts of this case. Petitioner claims that because of the possibility that the statute, as applied against someone else, might increase the maximum possible sentence, this Court should grant certiorari, and review his arguments. That issue is simply not ripe for adjudication in this instance.

Petitioner has not alleged the requisite particularized injury in a concrete manner. Nor does the case present such an anomaly or a departure from the fundamental principles of constitutional law to warrant review. *See Thompson v. United States*, 469 U.S. 1024 (1984). The redress that he seeks is the invalidation of Mont. Code Ann. § 46-18-221, Montana's weapon enhancement statute, because it has the potential to increase a sentence beyond the statutory maximum for a crime. This issue is too speculative and not properly before this Court. The

petition for certiorari should be denied because the issue is not ripe.

II. MONTANA'S WEAPON ENHANCEMENT STATUTE, WHICH IS INVOKED AT SENTENCING, VIOLATES NEITHER THE FOURTEENTH NOR THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner challenges the constitutionality of Mont. Code Ann. § 46-18-221 claiming the Montana Legislature erred when it created the weapon enhancement statute as a sentencing consideration for the judge rather than a separate offense which must be charged in the information and proved beyond a reasonable doubt to the jury. Petitioner claims the application of the weapon enhancement statute to him violated his rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. This argument failed before the Montana Supreme Court. It has failed before the Federal Court for the District of Montana and has failed before this Court. The petition for a writ of certiorari should be denied.

There are two cases discussed below which must be introduced. The Federal District Court of Montana recently decided *Nichols v. McCormick*, No. CV-89-028-BU-PGH (D. Mont. May 4, 1990), a federal habeas corpus action. The court's decision is attached as Appendix 1. In *Nichols*, the petitioner raised the identical constitutional arguments challenging Montana's weapon enhancement statute. Those arguments were rejected after comparison with and analysis of federal case law, the Sixth and Fourteenth Amendments, and the Montana statute.

A second case, *Walton v. Arizona*, 110 S. Ct. 3047, 58 U.S.L.W. 4994 (1990), was decided by this Court on June 27, 1990. In *Walton*, this Court rejected the argument that the factual determination by the court of aggravating and mitigating circumstances in a death penalty case created a separate offense that must be determined by a jury beyond a reasonable doubt. Petitioner in *Walton* pressed arguments parallel to the ones present in this case, and this Court rejected those arguments.

Both *Walton* and *Nichols* are discussed in detail below.

Defining a crime is a matter of state law, *Patterson v. New York*, 432 U.S. 197 (1977), and Montana has defined the crime for which petitioner was convicted as robbery, Mont. Code Ann. § 45-5-401. Petitioner's guilt on two counts of robbery was found beyond a reasonable doubt by the jury in *Krantz*, 47 St. Rptr. at 455, 456, 788 P.2d at 300. The Montana scheme of sentencing, after a finding of guilt, includes an increased term for use of a weapon during the commission of the felonies, Mont. Code Ann. § 46-18-221, and this statute was applied at sentencing to Krantz.

Petitioner argues that the Sixth and the Fourteenth Amendments to the United States Constitution require the weapon enhancement statute to be treated as a separate offense, compelling inclusion of specific allegations in the information and factual findings of the use of a weapon by a jury beyond a reasonable doubt. There is no constitutional requirement that Montana's weapon enhancement statute be classified as creating a separate offense and petitioner's argument was soundly rejected

by the Montana Supreme Court. This Court in *McMillan* addressed various constitutional aspects of a state firearm enhancement provision, a statute which operated similarly to Montana's. The Pennsylvania statute imposed a mandatory minimum period of incarceration, as does Montana's.[1] This Court held that such a statute may properly be treated as a sentence enhancement provision rather than a separate crime and consequently, the facts of enhancement need not be found by a jury beyond a reasonable doubt. *McMillan*, 477 U.S. at 91.

The elements of enhancement need only be determined by the sentencing judge by a preponderance of the evidence. *McMillan*, 477 U.S. at 88, 93. This Court further held that there was no Sixth Amendment right to a jury sentencing even when the sentence is based on specific findings of fact. *McMillan*, 477 U.S. at 93.

This Court has found a state sentencing statute that did not comport with traditional due process considerations, but the facts presented were extreme. Petitioner relies heavily on this case, *Specht v. Patterson*, 386 U.S. 605 (1967). In that case, the Supreme Court addressed an enhancement statute that could increase the period of incarceration beyond the maximum term for the underlying offense.

The problem confronted in *Specht* was the fact that the state of Colorado had sentenced the defendant without notice or hearing under Colorado's Sex Offender's

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[1] The provision did not increase the maximum sentence for the underlying offense.

Act. The Act provided that after reviewing the defendant's psychiatric evaluation, the trial court would determine if the defendant was a threat to the public, a habitual offender, or mentally ill. If the court so found, the defendant could be incarcerated for an indeterminate term of one day to life. *Specht*, 386 U.S. at 607-08.

This Court reasoned that due process would require that the defendant be present with counsel during the sentencing hearing, have an opportunity to be heard, confront the witnesses against him, have the right to cross-examination and to offer evidence, and that there be findings adequate for a meaningful appeal. This Court did not interpret due process requirements to require a finding by a jury beyond a reasonable doubt on all factual issues. This Court did reverse the sentence, holding that the sentencing procedure required determination of new factual issues under a discreet statute and that due process entitled the defendant to trial procedures on those issues. *Specht*, 386 U.S. at 609-10.

Petitioner's reliance on *Specht* is misplaced and was rejected by the Montana Supreme Court and the federal court in *Nichols*. In cases decided after *Specht*, this Court limited the potentially broad ramifications of *Specht* and its progeny.[2] That line of sentencing cases has culminated in *Walton v. Arizona, supra.*

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[2] *See Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re Winship*, 397 U.S. 358 (1970), which gave the states greater latitude in defining elements of a crime and distinguishing sentencing criteria.

In *Walton*, the defendant was found guilty of first-degree murder and was sentenced in a separate sentencing hearing before the court as required by state law, Ariz. Rev. Stat. Ann. § 18-703(B). A separate sentencing hearing was conducted to determine whether the sentence, after the finding of guilt for first degree murder, should be death or life imprisonment. The judge was required by the statute to determine at sentencing the existence or nonexistence of facts which acted as aggravating or mitigating circumstances as defined by Arizona Code.

One of the mitigating factors was whether or not the offense was committed in an especially "heinous, cruel or depraved manner." Ariz. Rev. Stat. Ann. § 18-703(F)(6). The burden of establishing aggravating circumstances was statutorily placed on the prosecution, while the burden of establishing mitigating circumstances under the Arizona statutory scheme was placed on the defendant. Ariz. Rev. Stat. Ann. § 18-703(C). The trial court in *Walton* found that two aggravating circumstances were present and no mitigating circumstances were substantial enough to call for leniency. The court, thereafter, sentenced Walton to death. *Walton*, 58 U.S.L.W. at 4993.

Walton's first argument on appeal was that every finding of fact underlying the sentencing decision had to be made by a jury, not a judge, and the Arizona scheme would only be constitutional under the Sixth and Fourteenth Amendments if a jury decided what facts constituting aggravating or mitigating circumstances were present. *Walton*, 58 U.S.L.W. at 4994. This Court refused to accept Walton's constitutional challenge of his sentence, and reiterated its prior holdings, which specifically

rejected constitutional challenges to death sentencing schemes which provided for sentencing by the judge and not the jury. *Walton*, 58 U.S.L.W. at 4994, citing *Hildwin v. Florida*, 490 U.S. ___ (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Proffitt v. Florida*, 428 U.S. 242 (1976). As this Court noted in *Walton*, citing *Poland v. Arizona*, 476 U.S. 147 (1986):

> "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of *life* and *death* imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.*, preclude the death penalty)."

Walton, 58 U.S.L.W. at 4994, citing *Poland*, 476 U.S. at 156.

This Court confirmed that a state was not required to "denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances." *Walton*, 58 U.S.L.W. at 4994. A judge could make factual determinations at sentencing pursuant to the statutory sentencing schemes and not violate the Sixth or Fourteenth Amendments. *Walton*, 58 U.S.L.W. at 4994. It is precisely the factual determination made by the sentencing judge that petitioner used a weapon in the commission of his felonies that he finds constitutionally repugnant. However, this Court has *already* decided this issue.

Montana's weapon enhancement statute is strikingly similar to the Arizona sentencing statute in that, after a

finding of guilt beyond a reasonable doubt of the underlying crime, the court is required to determine at the time of sentencing, the use of a weapon in the commission of the crime. The statute then compels the court to enhance the sentence from one to ten years pursuant to the statute. Mont. Code Ann. § 46-18-221.

The designation of elements of crimes and sentencing criteria is a matter for the states. The Montana Supreme Court explained its analysis of the federal cases cited by *both* parties:

> The message of *Patterson* and *McMillan* is that the decision to designate specified factors as elements of a crime as affirmative defenses, or as sentencing factors, is fundamentally a decision left to the states. In *McMillan* the Court restated the basic premise of *Patterson*:
>
> "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

State v. Krantz, 47 St. Rptr. 454, 460, 788 P.2d 298, 303, citing *McMillan*, 477 U.S. at 85 (quoting *Patterson*, 432 U.S. at 201, 202).

In analyzing federal case law, including *Patterson, McMillan, Specht, and Mullaney,* the Montana Supreme Court disagreed with the petitioner's interpretation of the cases. Petitioner argued that a logical conclusion to be drawn from these cases would be as follows. Factors which may increase a sentence beyond the maximum for the underlying crime were separate crimes or elements of a crime subject to full due process procedures. *Krantz,* 47 St. Rptr. at 460, 788 P.2d at 303. The Montana Supreme Court rejected that argument, finding it too narrow an interpretation of federal case law. *Id.*

The Montana court also commented on the United States Supreme Court and its rationale in *McMillan, supra*:

> The Court's primary concern in this series of cases is that states would circumvent due process by redefining the essential elements of guilt as affirmative defenses or as sentencing factors.

Krantz, 47 St. Rptr. at 461, 788 P.2d at 304. Neither the Montana statute nor the Legislature's intent when it created the sentencing scheme leads to a conclusion that the statute transforms elements of a crime into sentencing factors:

> The 1977 Montana Legislature adopted the weapon enhancement statute as part of a bill intended to limit the discretion of sentencing courts by establishing guidelines and minimum mandatory sentences for potentially violent crimes. Consideration of H.B. 261 before the Senate Judiciary Comm. 45th Leg. (1977) (statement of Rep. Ramirez). Like the Pennsylvania statute challenged in *McMillan,* the Montana statute simply takes one factor traditionally used in sentencing, the use of a weapon during a crime, and dictates the minimum weight the

> court must assign. *See McMillan*, 477 U.S. at 89-90, 106 S.Ct. at 2418, 91 L.Ed.2d at 78-79.

Krantz, 47 St. Rptr. at 461, 788 P.2d at 304.

The weapon enhancement statute in Montana does not impermissibly erode or alter the elements of the underlying crime as the Montana court determined.

> The elements of the underlying crime in this case, robbery, have remained essentially the same since territorial times. Compare § 45-5-401, MCA (1989) with Laws of Mont. Ch. VI, § 71 (1879).

Krantz, 47 St. Rptr. at 461, 788 P.2d at 304. In a conclusion that comports squarely with the line of United States Supreme Court cases discussed by both parties, the Montana Supreme Court found that:

> [a]ll sentencing factors may, and often do, require the court to consider facts not established during trial. These elements are as much pertinent and necessary attributes of traditional sentencing considerations as they are attributes of substantive crimes.

Krantz, 47 St. Rptr. at 461, 462, 788 P.2d at 304. The decision by the Montana Supreme Court was not an anomaly, but only the logical culmination of a criminal matter when viewing the legal foundation upon which the case was based. *See State v. Forsyth*, 45 St. Rptr. 1577, 761 P.2d 363 (1988); *State v. Spurlock*, 225 Mont. 238, 731 P.2d 1315 (1987); *State v. Davison*, 188 Mont. 432, 614 P.2d 489 (1980).

As prefaced above, the Federal District Court for Montana has already reviewed Montana's weapon enhancement statute and found it constitutional under

Sixth and Fourteenth Amendment challenges in *Nichols v. McCormick, supra.* Nichols filed a petition for habeas corpus in the Montana Federal District Court after his state appeal for convictions of the criminal offenses of kidnapping and misdemeanor assault had been denied. *State v. Nichols,* 222 Mont. 71, 720 P.2d 1157 (1986). With the petition for the writ of habeas corpus Nichols placed before the Federal Court the constitutionality of Montana's weapon enhancement statute claiming that the weapon enhancement statute, when it was applied at the time of sentencing, violated the Sixth and Fourteenth Amendments.

The Federal Court rejected Nichols' argument that the statute contravened the due process clause.

> The decision of the Montana Supreme Court in *Krantz* establishes the Montana statutory plan was not intended by the Legislature to make possession of a weapon an element of the underlying offense, in Nichols' case kidnapping, which must be proved beyond a reasonable doubt.

Nichols, (App. at 17).

Under the relevant state law, the identified fact, *i.e.,* possession of a weapon, was not essential to establish criminality in the first instance. The Federal Court held that the Montana weapon enhancement statute did not violate the due process clause of the Fourteenth Amendment of the United States Constitution and concluded that the possession of a weapon did not constitute an element of the substantive underlying crime of kidnapping. (App. at 23.)

The Federal Court in reviewing Nichols' petition began with an examination of Montana case law and noted that the Montana Supreme Court had expressly held on many occasions that the enhancement statute did not create a separate substantive offense but only provided "for an enhanced penalty once the defendant has been found guilty of an underlying offense. *State v. Davison*, 188 Mont. 432, 614 P.2d 489, 496-97 (1980)." (App. 1 at 5.) *State v. Krantz, supra, State v. Forsyth*, 233 Mont. 389, 761 P.2d 363 (1988), and *State v. Spurlock*, 225 Mont. 238, 731 P.2d 1315.[3]

Petitioner here attempts to convince this Court that Mont. Code Ann. § 46-18-221 creates a separate offense, use of a weapon in the commission of a felony, in addition to the underlying crime. Petitioner urges that a finding of the so-called separate offense calls for the full panoply of due process rights as opposed to the statute's application as simply limiting the sentencing court's discretion by mandating a minimum sentence. As the *Nichols* court stated, this characterization was precisely the one rejected by the Montana Supreme Court in *Krantz, supra*. (App. 1 at 6.) As the Federal District Court succinctly stated: "The obvious thrust of Krantz' argument was that the possession of a firearm is an element of the crime for which he was being sentenced and, accordingly, is a question of fact which must be proved beyond a reasonable doubt." (App. 1 at 6.)

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[3] These cases comprise only a few of the decisions affirming the constitutionality of the State's weapon enhancement statute. *See also Krantz*, 47 St. Rptr. at 462, 788 P.2d at 305.

After discussing the Montana Supreme Court's review of federal precedence the Federal District Court stated:

> The linchpin of the *Krantz* decision lies in the court's conclusion that the use of a weapon, although a finding of fact essential to imposition of a penalty under the weapon enhancement statute, is not an element essential to the finding of guilt of the underlying crime. 47 St.Rptr. 454. *Ergo*, the court reasoned, the enhancement statute does not exceed the state's authority to pursue its fundamental right of defining the crime and prescribing punishment. 47 St.Rptr. at 460-61. The court stated its belief the "system" established by the Montana Legislature for enhancement of penalty in crimes involving the use of a weapon does not circumvent due process of law by "redefining the essential elements of guilt as affirmative defenses or as sentencing factors". 47 St.Rptr. 454,

(App. at 7, 8.) The Nichols' court faced squarely whether the statutory scheme of Montana's weapon enhancement statute comported with the due process requirements as outlined in *In Re Winship, Specht, Mullaney, Patterson,* and *McMillan*.

The court analyzed whether possession of a firearm constituted a fact necessary to define the crime for which Nichols was convicted and thus required proof beyond a reasonable doubt. (App. 1 at 17.) Petitioner's only support for this position was provided by *Adamson v. Ricketts*, 856 F.2d 1011 (9th Cir. 1988), *cert. denied*, 110 S. Ct. 3287 (June 28, 1990). However, that case lost its precedential value when this Court denied certiorari on June 28, 1990. The controlling case, *Walton v. Arizona, supra*, was decided the day before, June 27, 1990.

Even without the guidance of *Walton*, the Federal Court found Montana's statutory sentencing scheme differed from the one addressed in *Adamson*, and therefore, *Adamson* was not dispositive. The court upheld the statute as constitutional.

Petitioner attempts to inflate this issue to constitutional proportions, however he is arguing in the face of clear legal precedents. His constitutional arguments have been rejected by the Montana Supreme Court, the Federal District Court for Montana, and the United States Supreme Court. Montana's weapon enhancement statute is a sentencing statute and does not constitute a separate crime. The statute, Mont. Code Ann. § 46-18-221, does not violate the Sixth or Fourteenth Amendment.

CONCLUSION

For the reasons presented above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, BUTTE DIVISION

DAN NICHOLS

V.

JACK McCORMICK, Warden

JUDGMENT IN A CIVIL CASE

CASE NUMBER: CV- 89-028-BU-PGH

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the present petition for habeas corpus relief, pursuant to 28 U.S.C. § 2254, be, and the same hereby is, DENIED.

May 4, 1990
Date

LOU ALEKSICH, JR.
Clerk

FILED, ENTERED AND NOTED
IN CIVIL JUDGMENT BOOK
Volume Page

/s/ Renate Weldele
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

DAN NICHOLS,	)	
Petitioner,	)	NO. CV-89-028-BU-PGH
vs.	)	
JACK McCORMICK, Warden,	)	MEMORANDUM AND ORDER
Respondent.	)	
	)	FILED
	)	1990 MAY – 4 AM 8:17

The petitioner, Dan Nichols, challenges the judgment of conviction entered against him upon a trial by jury in the District Court of the Fifth Judicial District of the State of Montana for the criminal offenses of kidnapping and misdemeanor assault. *See, State v. Nichols*, 222 Mont. 71, 720 P.2d 1157 (1986). Nichols was sentenced to a term of imprisonment of twenty years and six months; a period comprised of a ten-year term for the kidnapping conviction, a six-month term for the misdemeanor assault conviction and a ten-year term, pursuant to the Montana sentence enhancement statute, Mont.Code Ann. § 46-18-221 (1985), for use of a weapon while engaged in the commission of felony kidnapping. 720 P.2d at 1158. Nichols instituted the present action for habeas corpus

relief pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the ten-year sentence imposed upon him under the weapon enhancement statute.[1]

It is undisputed the charging document, an information, filed by the State, did not charge Nichols with a violation of Mont.Code Ann. § 46-18-221. Nonetheless, the sentencing court utilized Mont.Code Ann. § 46-18-221 to "enhance" Nichols' sentence of incarceration by ten years. Nichols' petition places in issue the constitutionality of Montana's weapon enhancement statute, Mont.Code Ann. § 46-18-221 (1985), on its face and as applied to Nichols. Nichols contends the trial court's enhancement of his sentence, pursuant to section 46-18-221, served to deprive him of his right to due process of law, his right to know the nature and cause of the criminal accusation against him, and his right to a

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[1] The respondent seeks dismissal of the petition upon the ground Nichols is procedurally barred from raising the subject claims in federal habeas proceedings. *See, Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986). Review of proceedings in the Montana Supreme Court upon Nichols' petition for post-conviction relief, wherein Nichols asserted the identical claims, convinces the court the present situation falls within the purview of the rule announced in *Huffman v. Ricketts*, 750 F.2d 798, 800 (9th Cir. 1984). The State contends the Montana Supreme Court did not address the merits of Nichols' claims. The order of the Montana Supreme Court denying Nichols' petition is somewhat ambiguous. However, cognizant of the fact the default rule enunciated in *Sykes* is a rule based upon comity, the balance must be struck in favor of allowing Nichols to have his claim resolved upon the merits.

jury determination on the elements of the crime, in violation of the sixth and fourteenth amendments.[2]

I.

Montana's weapon enhancement statute provides that anyone convicted of any offense shall, "in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment of not less than two years or more than ten years" if "while engaged in the commission of the offense" the defendant is found to have "knowingly displayed, brandished, or otherwise used a firearm." Mont.Code Ann. § 46-18-221.[3]

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[2] Nichols' petition was referred to the United States Magistrate for the District of Montana for recommended disposition in accordance with 28 U.S.C. § 636. The Magistrate filed his report with the court on January 4, 1990, recommending dismissal of the petition. The court reviews the objections to the report *de novo*.

[3] Mont.Code Ann. § 46-18-221 (1985) provides in full:

> **Additional sentence for offenses committed with a dangerous weapon.** (1) A person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years or more than 10 years, except as provided in 46-18-222.
>
> (2) A person convicted of a second or subsequent offense under this section shall, in addition to

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The Montana Supreme Court has expressly held the enhancement statute does not create a separate, substantive offense, but only "provide[s] for an enhanced penalty once the defendant has been found guilty of an underlying offense." *State v. Davison*, 188 Mont. 432, 614 P.2d 489, 496-97 (1980). A review of the more recent Montana decisional law evinces the continued vitality of the holding in *Davison*. *See, State v. Krantz*, ___ Mont. ___, 47 St.Rptr. 454

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the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years, except as provided in 46-18-222. For the purposes of this subsection, the following persons shall be considered to have been convicted of a previous offense under this section:

(a) a person who has previously been convicted of an offense, committed on a different occasion than the present offense, under 18 U.S.C. 924(c); and

(b) a person who has previously been convicted of an offense in this or another state, committed on a different occasion than the present offense, during the commission of which he knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon.

(3) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 4618-222.

(4) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the offense.

(1990); *State v. Forsyth*, ___ Mont. ___, 761 P.2d 363 (1988); *State v. Spurlock*, 225 Mont. 238, 731 P.2d 1315 (1987).

The gravamen of Nichols' position lies in his assertion that Mont.Code Ann. § 46-18-221 creates a separate offense calling for a separate penalty, as opposed to merely operating to limit the sentencing court's discretion by prescribing a mandatory minimum sentence. This precise characterization of the weapon enhancement statute was rejected by the Montana Supreme Court in *Krantz*. The appellant in *Krantz* argued the weapon enhancement statute creates a distinct crime separate from the underlying offense. 47 St.Rptr. at 454. Accordingly, Krantz contended due process of law required that a violation of the statute must be set forth in the charging instrument and submitted to the jury for a determination of all pertinent facts beyond a reasonable doubt. Krantz, as does Nichols in the case at bar, asserted the imposition of a sentence pursuant to the weapon enhancement statute, when a violation of the statute was not charged, constituted a violation of both his right to trial by jury and due process of law. The obvious thrust of Krantz' argument was that the possession of a firearm is an element of the crime for which he was being sentenced and, accordingly, is a question of fact which must be proved beyond a reasonable doubt.

After reviewing the United States Supreme Court decisions it deemed pertinent to the issues presented, *i.e.*, *Specht v. Patterson*, 386 U.S. 605 (1967), *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the *Krantz* court reasoned the "primary concern in these series of cases was that

states would circumvent due process by redefining the essential elements of guilt as affirmative defenses or as sentencing factors." 47 St.Rptr. at 461. The court concluded Montana's weapon enhancement statute did not go beyond the "permissible limits" of the Due Process Clause because it had neither effect. *Id.* Rather, the court, cognizant of the fact the enhancement statute was part of a statutory scheme designed to limit the discretion of sentencing courts by establishing guidelines and minimum mandatory sentences, concluded the statute simply "takes one factor traditionally used in sentencing, the use of a weapon during a crime, and dictates the minimum weight the court must assign." 47 St.Rptr. at 461. The court rejected the proposition that once an enhancement statute allows imposition of a sentence which exceeds the maximum sentence prescribed for the underlying substantive offense, the statute must be considered as creating a separate substantive offense with respect to which the accused is entitled to his full panoply of constitutional rights. 47 St.Rptr. at 460-461. In rejecting this position, the Montana Supreme Court concluded "[t]he message of *Patterson* and *McMillan* is that the decision to designate specified factors as elements of a crime, as affirmative defenses, or as sentencing factors, is fundamentally a decision left to the states." 47 St.Rptr. at 460.

The linchpin of the *Krantz* decision lies in the court's conclusion that the use of a weapon, although a finding of fact essential to imposition of a penalty under the weapon enhancement statute, is not an element essential to the finding of guilt of the underlying crime. 47 St.Rptr. 454. *Ergo*, the court reasoned, the enhancement statute

does not exceed the state's authority to pursue its fundamental right of defining the crime and prescribing punishment. 47 St.Rptr. at 460-61. The court stated its belief the "system" established by the Montana Legislature for enhancement of penalty in crimes involving the use of a weapon does not circumvent due process of law by "redefining the essential elements of guilt as affirmative defenses or as sentencing factors." 47 St.Rptr. 454.

A recapitulation of the Montana Supreme Court's interpretation of the weapon enhancement statute is a prerequisite to this court's assessment of the validity of the present petition for habeas relief, since this court is bound by the Montana Supreme Court's interpretations of Montana law. *See, Townzen v. Craven,* 444 F.2d 315, 316 (9th Cir. 1971). Cognizant of the Montana Supreme Court's holding that the weapon enhancement statute does not create a separate substantive offense but merely sets forth a legitimate factor to be considered by a trial court in imposing sentence, this court turns to address the constitutional validity of the Montana weapon enhancement statute and the application of that statute to Nichols.[4]

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[4] The constitutional validity of the Montana weapon enhancement statute passed scrutiny under the Due Process Clause in *LaMere v. Risley,* 827 F.2d 622 (9th Cir. 1987) (defendant not deprived of due process by application of Mont.Code Ann. § 46-18-221 although information did not charge violation). The validity of the statute is appropriate reassessed in light of *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir. 1988).

II.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. In striking a balance between the state's power to regulate procedures under which its laws are carried out, and the right of an accused to due process of law, the Supreme Court has declared that the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977). There are, however, obvious constitutional limits beyond which the states may not go in establishing the elements of a crime and the allocation of burden of proof with respect to each of those elements. *Patterson*, 432 U.S. at 210. Due process of law does require that a State must prove every ingredient of an offense beyond a reasonable doubt, and does not allow the State to shift the burden of proof to the defendant by presuming a necessary ingredient upon proof of the other elements of the offense. *Patterson*, 432 U.S. at 215 (*citing*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).[5]

The Court in *Patterson* rejected the suggestion that its holding in *Mullaney* should be broadly read to mean that a "State may not permit the blameworthiness of an act or

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[5] In *Patterson*, the Court upheld that aspect of the State of New York's murder statutes which allowed for reduction of a murder conviction to manslaughter upon affirmative proof by the defendant, beyond a reasonable doubt, that he was acting under the influence of extreme emotional distress. 432 U.S. at 205.

the severity of the punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt." 432 U.S. at 214. The Court proceeded to state:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

432 U.S. at 215.[6]

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[6] A re-visitation to *Mullaney* is appropriate. There the Court held the Due Process Clause "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. at 704. The criminal statute invalidated in *Mullaney, i.e.*, the State of Maine's murder statute, included malice as part of the definition of murder. Under the statute, a person accused of murder could rebut the statutory presumption that he committed the offense with "malice aforethought" by proving that he acted in the heat of passion on sudden provocation. The Court held the scheme improperly shifted the burden of proof from the State to the defendant in contravention of the Due Process Clause as construed in *In re Winship*, 397 U.S. 358 (1970). 421 U.S. at 703-04. The Court expressly rejected the notion that *Winship* is limited to those facts that constitute a crime as defined by state law. 421 U.S. at 698.

The Supreme Court's most recent pronouncement regarding the interplay between the Due Process Clause, as interpreted in *In re Winship*, *Mullaney* and *Patterson*, and the right of the several states to define and punish criminal conduct came in *McMillan v. Pennsylvania*, 477 U.S. 79. Under constitutional challenge in *McMillan* was Pennsylvania's mandatory minimum sentencing act, 42 Pa.Cons. Stat. § 9712 (1982), which provides, *inter alia*, that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge finds, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. 477 U.S. at 81.[7] The petitioner in *McMillan* argued that under the Due Process Clause, as interpreted in *Winship* and *Mullaney*, if a State wants to punish visible possession of a firearm it must undertake the burden of proving that fact beyond a reasonable doubt. 477 U.S. at 84. The Court, however, rejected the petitioner's argument, concluding that "States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense." 477 U.S. at 89-90. The Court found the issue presented to have been controlled by its holding in *Patterson*. 477 U.S. at 85.

The Court in *McMillan* began its analysis, as it did in *Patterson* rejecting the suggestion that whenever a State links the "severity of punishment to the presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. 477 U.S. at 84 (citation omitted). While acknowledging the existence of constitutional limits beyond which the States may not go in defining the elements of a criminal offense, the Court

stated: "*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt, the State Legislature's definition of the elements of the offense is usually dispositive. . . . " 477 U.S. at 85. The Court did not see the Pennsylvania act as creating the sort of presumption of guilt condemned in *Patterson (citing McFarlane v. American Sugar Refining Co.*, 241 U.S. 79 (1916); *Tot v. United States*, 319 U.S. 463 (1943)). 477 U.S. at 87. Nor did the Act, the Court concluded, operate to relieve the prosecution of its burden of proving guilt, but under its express terms, becomes applicable only after defendant has been duly convicted of a crime for which he is to be punished. *Id.*

Critical to the rationale expressed in *McMillan*, was the fact the enhancement statute "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88.[8] The Court emphasized that the

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[7] The pertinent provisions of the Pennsylvania act direct the trial judge to consider, at the time of sentencing, the evidence introduced at trial and any additional evidence offered by either the defendant or the State. The act operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony, but it does not authorize a sentence in excess of that otherwise allowed for the underlying offense. 477 U.S. at 82.

[8] The *McMillan* Court expressly recognized that the petitioner's claim "that visible possession under the Pennsylvania statute is 'really' an element of the offense for which they are

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Pennsylvania Legislature, in its passage of the Act, did not change the definition of any existing offense but simply took one factor which has traditionally been considered by sentencing courts to bear on punishment, i.e., the instrumentality used in committing a violent felony, and dictated the precise weight to be given that factor if the instrumentality is a firearm. 477 U.S. at 89-90. While the Court sustained the constitutional validity of Pennsylvania's mandatory minimum sentencing act, the Court quickly cautioned that it was not attempting to lay down. any "bright line" test, leaving the constitutionality of similar statutes to depend on "differences of degree". 477 U.S. at 91.[9]

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being punished that Pennsylvania has in effect defined a new set of upgraded felonies – would have at least more superficial appeal if the finding of visible possession exposed them to greater or additional punishment. . . . " 477 U.S. at 88. The Court chose not to elaborate.

[9] The five-four majority opinion was the subject of a spirited dissent from Justice Stevens. 477 U.S. at 95-105. Concerned that the importance of the reasonable doubt standard, and the Constitution itself, would be demeaned if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an "element" of a crime, Justice Stevens stated:

> "Appropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a state to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction. It

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The *McMillan* Court's broad statement that "[s]tates may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense . . . ", the State of Montana submits, is dispositive of Nichols' claim. The State, of course, views it to be entirely within the prerogative of the several states to determine whether a particular factor is to be deemed a sentencing consideration as opposed to an element of a particular offense. It is urged by Nichols, however, that *McMillan* may be distinguished since Pennsylvania's mandatory minimum sentencing act serves only to limit the sentencing judge's discretion, and unlike Montana's weapon enhancement statute, does not operate to increase the maximum penalty permitted for the underlying offense. This distinction, Nichols urges, compels the conclusion the particular factor which brings the enhancement statute into play, *i.e.*, knowing possession of a weapon, must be charged and proved beyond a reasonable doubt. Nichols implores the court to recognize that the Montana weapon enhancement statute serves, in effect, to define a set of "aggravated" felonies.

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> follows, I submit, if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*."

477 U.S. at 79. In his opinion, "[n]othing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are 'elements' that it must prove beyond a reasonable doubt at trial." 477 U.S. at 98.

The difference between Montana's weapon enhancement statute and Pennsylvania's mandatory minimum sentencing act, challenged in *McMillan*, is obvious. Montana's statute operates to alter the maximum penalty for the crime committed, as opposed to simply limiting the sentencing court's discretion. The statute increases the maximum penalties, as otherwise prescribed for all felonies, by ten years. The court must decide whether this statutory scheme comports with the due process requirement, as defined in *In re Winship*, that the prosecution prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. at 364.

The *McMillan* Court expressly recognized that states "may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of a particular offense. . . . " 477 U.S. at 91. Although the Court suggested that a statutory scheme like Montana's, which serves to create a set of "upgraded felonies" might be subjected to closer scrutiny, the Court stopped short of reaching this conclusion. 477 U.S. at 88. The Court further viewed as insignificant to due process analysis, the fact some states have chosen to make possession of a weapon an element of various aggravated offenses: "[t]he fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system which demands '[t]olerance for a spectrum of State procedures dealing with a common problem of law enforcement.' *Spencer v. Texas*, 385 U.S. 554, 566 (1967)." 477 U.S. at 90. Contrary to the assertion of Nichols, the fact the Montana scheme operates to increase the sentencing

range for felonies, as opposed to merely limiting the sentencing court's discretion, does not compel the conclusion the statute contravenes the Due Process Clause under the rationale of *McMillan*.

The Court in *McMillan*, as it had in *Patterson*, rejected the claim that "whenever a State links the 'severity of punishment' to the 'presence or absence of an identified fact', the State must prove that fact beyond a reasonable doubt." 477 U.S. at 84 (citation omitted). This major premise established, the Court proceeded to develop an analytical framework for determining what facts constitute the elements of an offense and, accordingly, must be proved beyond a reasonable doubt. First, all the elements included in the definition of the offense, as established by state law, must be proven beyond a reasonable doubt. 477 U.S. at 85. Second, the definition adopted by a state cannot be designed to "evade" the commands of *Winship*. 477 U.S. at 89. The latter inquiry, of course, entails an analysis which proceeds beyond the face of the challenged statute to a determination of whether the reasonable-doubt requirement "applies to facts not formally identified as elements of the offense charged." 477 U.S. at 86.[10]

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[10] Although framed by the *McMillan* court as two distinct inquiries, it would seem, as a practical matter, the inquiries meld into one, *i.e.*, whether the identified fact which bears upon the severity of punishment is one which due process of law requires to be proven beyond a reasonable doubt. The state legislature defines the offense that is charged in any given case. A federal habeas court in turn is bound by state court interpretations of that statute. *Townzen v. Craven*, 444 F.2d 315,

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The decision of the Montana Supreme Court in *Krantz* establishes the Montana statutory plan was not intended by the Legislature to make possession of a weapon an element of the underlying offense, in Nichols' case kidnapping, which must be proved beyond a reasonable doubt. 47 St.Rptr. at 461-62.[11] Under the relevant state law the identified fact, *i.e.*, possession of a weapon, is not essential to establish criminality in the first instance. 47 St.Rptr. at 461. Thus, the issue presented reduces to whether, under a due process analysis, possession of a firearm constituted a fact necessary to constitute the crime for which Nichols was convicted. *See, In re Winship*, 397 U.S. at 364.[12]

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316 (9th Cir. 1971). In view of the exhaustion requirement attendant habeas proceedings under 28 U.S.C. § 2254, the challenged statute will, in most instances, as in the case at bar, have withstood constitutional challenge in the state courts. *See*, 28 U.S.C. § 2254(b).

[11] A reading of Mont.Code Ann. § 46-18-221 would indicate otherwise; a conclusion reached by the dissent in *Krantz*. 47 St.Rptr. at 464-66 (Sheehy, J., dissenting).

[12] There exists no indication Montana restructured its criminal code and concomitant penalty structure in an attempt to "evade" the commands of *Winship*, a specter of concern underlying the Court's rationale in *Winship* and *Mullaney*. *See, Mullaney*, 421 U.S. at 698. The Montana Legislature adopted the weapon enhancement statute as part of a bill intended to limit the discretion of sentencing courts. *State v. Krantz, supra*, 47 St.Rptr. at 461. No claim is made, nor is the court aware, that a revision of the substantive criminal statutes occurred contemporaneously with the enactment of the enhancement scheme. *Id.*

The Montana enhancement scheme goes one step beyond the Pennsylvania scheme scrutinized by the Court in *McMillan*, linking the available range of sentence to the existence of an identified fact. As noted, Nichols urges this distinction results in Montana's scheme exceeding the constitutional limit envisioned, yet not precisely defined, by the Court in *Patterson* and *McMillan*. *See, McMillan*, 477 U.S. at 86; *cf., Adamson v. Ricketts*, 865 F.2d 1011, 1024 (9th Cir. 1988). The court disagrees.

Support for Nichols' position is arguably provided by the Ninth Circuit Court of Appeals' decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). Under constitutional scrutiny by the *en banc* court in *Adamson* was Arizona's death penalty statute, Ariz.Stat. § 13-703. Section 13-703 delegated the responsibility for deciding whether a defendant would receive a life sentence or death to the judge who presided over a separate, statutorily mandated, aggravation-mitigation hearing. 865 F.2d at 1024-1025. Adamson challenged this statutory scheme as violative of the Due Process Clause of the fourteenth amendment, contending the scheme operated to deprive him of his fundamental right to a jury trial. 865 F.2d at 1025.

Upon examination of the scheme, the *Adamson* court concluded the "aggravating circumstances", the existence of which were essential to imposition of the death penalty, are "additional *elements*" necessary for finding that a defendant is guilty of the distinctive offense of *capital* murder." 865 F.2d at 1925-1026 (emphasis in original). The court viewed as compelling the fact the "aggravating circumstance", with its attendant burden of proof, *i.e.*, beyond a reasonable doubt, mirrored "the attributes of an

essential element of the offense during the guilt phase of a trial." 865 at 1026. Likewise, the subjective inquiry into the defendant's state of mind which the statutory scheme required, entailed a factual assessment traditionally within the jury's domain of decision. 865 at 1026-1027.[13]

The *Adamson* court found *McMillan* provided additional support for its conclusion. 865 F.2d at 1027. Of import to the present analysis is the significance the *Adamson* court attributed to the "emphasis" placed by the Court in *McMillan* and the fact the Pennsylvania statute did not operate to alter the sentencing range already available to the trial court. 865 F.2d at 1027-1028. Because the finding of aggravating circumstances exposed the defendant to greater or additional punishment under the Arizona scheme, the *Adamson* court concluded the finding must be afforded the status of an "element" of a capital offense. *Id.*

I am unpersuaded that *Adamson* controls disposition of the issue *sub judice*. The court's conclusions in *Adamson* cannot be divorced from the historical considerations assessed by the court in striking down the Arizona statutory scheme. The "revised" statutory scheme, the court observed, "*withdrew* from the definition of its homicide crimes various 'elements' traditionally preserved in Arizona for jury determination and reclassified them as judicial sentencing circumstances." 865 F.2d at 1027.

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[13] The *Adamson* court employed, in essence, the historical test advanced by the *Patterson* dissent, 432 U.S. at 216 (Powell, J., dissenting), and alluded to by the Court in *McMillan*. 477 U.S. at 90.

(emphasis in original). "The confluence of the elements and circumstances, combined with the simultaneous repeal of the statute allocating the burden of proving mitigation at trial and enactment of the statute allocating this burden at judicial sentencing, distinguishes Arizona's scheme from the one in McMillan." 865 F.2d at 1027. Unlike the Arizona statutory scheme addressed in *Adamson*, Montana's sentence enhancement scheme was not part of a revision of the substantive criminal statutes which operated to withdraw particular "elements" of substantive crimes traditionally preserved for determination by a jury, and simply classify those elements as sentencing considerations. *See, Krantz, supra*, 47 St.Rptr. at 462.[14]

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[14] The *Adamson* court observed: "[T]he parameters of what an 'element' – so as to fall within the jury's factfinding responsibilities – remain elusive. A line of due process cases considering such contours has failed to produce concrete guidelines." 865 F.2d at 1024. *Adamson*, the present case, and *McMillan* itself, poignantly exemplify the difficulty of establishing discernible contours for determining when state criminal legislation crosses the permissible constitutional line.

In taking issue with the *McMillan* majority, Justice Stevens urged the majority to recognize the "purposive" approach adopted by the Court in *In re Winship* in attempting to define the precise contours of the Due Process Clause. 477 U.S. at 98 (Stevens, J., dissenting). The distinction between aggravating and mitigating facts, he observed, plays a vital role in maintaining the integrity of the Constitution, in particular the Due Process Clause. 477 U.S. at 100-103.

One would have to believe Justice Stevens envisioned the dilemma the more nebulous standard adopted by the *McMillan* majority would create in its application.

Any distinction drawn between the Pennsylvania scheme and the Montana scheme, I believe, would prove illusory, in view of the adjudication of the Due Process Clause rendered by the majority opinion in *McMillan*.[15]

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[15] I am compelled to note my agreement with the dissenting opinions expressed by Justice Powell in *Patterson*, 432 U.S. at 216-232, and Justice Stevens in *McMillan*, 477 U.S. at 95-104. While it is uncontroverted that it is the State's business to define criminal conduct and prescribe appropriate penalties, "nothing in *Patterson* or any of its predecessors authorizes a State to decide for itself which of the ingredients of the prohibited transaction are 'elements' that it must prove beyond a reasonable doubt at trial." *McMillan*, 477 U.S. at 98 (Stevens, J., dissenting). "A state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. . . . The Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and special punishment beyond a reasonable doubt. This much has been evident at least since *In re Winship*, 397 U.S. 358 (1970)." *Id.* at 96.

I believe the Due Process Clause, as interpreted by the *In re Winship* court, requires possession of a firearm, under the Montana scheme, to be considered an element of a criminal offense to which the proof beyond a reasonable doubt requirement applies. My opinion, however, does not constitute the supreme law of the land. The interpretation of the Due Process Clause, as embodied in the Supreme Court's decision in *McMillan*, constitutes the controlling law in this case. Any change or clarification of that law must emanate from the Supreme Court. In that regard, Justice Powell expressed his confidence that the Court would, even under the formalistic approach of constitutional adjudication adopted in *Patterson*, "find some way" to strike down a formalistically correct yet egregious statute. 432 U.S. at 225 n.9. Yet, as he correctly

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The procedural requirements that states must meet to comply with the mandate of the Due Process Clause are not amorphous in nature, left to be defined by the legislation of a particular state. *See, McMillan,* 477 U.S. at 93 (Marshall, J., dissenting). This principle is the very bedrock of the *Winship/Mullaney* rationale, which requires a due process analysis that looks to the "operation and effect of the law as applied." *Mullaney,* 421 U.S. at 699 (*citing, St. Louis S.W.R. Co. v. Arkansas,* 235 U.S. 350, 362 (1914)). In that vein, once a state defines a criminal offense, "the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt." *McMillan,* 477 U.S. at 96 (Stevens, J., dissenting). The clear import of *McMillan* lies in the Court's recognition that possession of a weapon, while a factor which bears upon the severity of punishment, is not an "element" of a criminal offense which due process of law requires to be proven beyond a reasonable doubt. 477 U.S. at 89-91. A state's decision to dictate that a factor traditionally considered by sentencing courts to bear on punishment – use of a weapon in committing a felony – does not "transfor[m] against its will a sentencing factor into an 'element' of some hypothetical 'offense'." 477 U.S. at 89-90. In view of the rationale employed by the Court

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observed, the approach adopted in *Patterson,* and carried on in *McMillan,* fails to establish a "conceptual framework for distinguishing abuses from legitimate legislative adjustments" in defining crime in the concomitant burden of persuasion. *Id.*

in *McMillan*, I am unable to perceive how the "due process calculus" would change based upon the statutory methodology utilized by a legislature in dictating that possession of a weapon is to be considered in passing sentence for a criminal offense. 477 U.S. at 92.[16]

Therefore, the court holds the Montana weapon enhancement statute, Mont.Code Ann. § 46-18-221 (1985), is not violative of the Due Process Clause of the fourteenth amendment either on its face, or as applied to the petitioner Dan Nichols.

The conclusion that the possession of a weapon does not constitute an element of the substantive crime of kidnapping with which Nichols was charged is determinative of the remainder of the constitutional challenge Nichols advances. Therefore,

IT IS HEREBY ORDERED that the present petition for habeas corpus relief, pursuant to 28 U.S.C. § 2254, be, and the same hereby is, DENIED.

The Clerk shall enter JUDGMENT accordingly, and notify the parties as to the entry thereof.

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[16] Recognition of the fact the procedural mandate of the Due Process Clause does not depend upon the legislative enactment of a particular state compels this court to conclude that Montana's weapon enhancement statute falls on the permissible side of the constitutional line. Ironically enough, recognition of this fact prompted the dissents in both *Patterson* and *McMillan*.

DATED this 3 day of May, 1990.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT